IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-6714

EMMETT J. STEBBINS,

Petitioner,

v.

KEYSTONE INSURANCE COMPANY, and KEYSTONE PHILADELPHIA AUTOMOBILE CLUB OF PHILADELPHIA, PENNSYLVANIA,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

EMMETT J. STEBBINS,

Petitioner

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Emmett J. Stebbins, your petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit to review the orders entered in this proceeding on February 4, and 27, 1974.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the District of Columbia Circuit is unofficially reported at 481 F. 2d 501 (1973). The Memorandum Opinion of the District Court for the District of Columbia is unofficially reported at 2 Employment Practice Decisions, Paragraph 10,268, page 1093. The Memorandum Opinion of the District Court reads in significant part:

> "Plaintiff's primary grievance under the present complaint arises from a letter dated November 26, 1969, from Keystone reading in pertinent part:
>
> > "In any event, because of the seemingly endless harassing litigation you instituted against this company without good cause and without basis in law or fact, the Keystone Insurance Company would not be interested in any application filed by you for any job."
>
> Whatever may be plaintiff's qualifications or defendant's available jobs, a refusal to hire made partially on the grounds stated in the second paragraph of the November 26, 1969, letter would be contrary to the requirements of 42 U.S.C., Section 2000e-3(a). *Pettway v. American Cast Iron Pipe Company* (C.A. 5, 1969), 411 F.2d 998. Accordingly, summary judgment is granted plaintiff to the limited extent of a declaration that the quoted portion of Keystone's letter was in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, *et seq.*
>
> The remainder of the complaint must be dismissed. As plaintiff and amicus, Equal Employment Opportunity Commission, recognize, any claim of discrimination under either Act – and

> no discrimination has been established – requires as a predicate demonstration that the plaintiff is qualified for the employment he seeks in the insurance industry. This issue has been litigated in this Court in another insurance company and decided adversely to him. *Stebbins v. Insurance Company of North America*, Civil Action No. 2848-69 (D.D.C., June 30, 1970). He is collaterally estopped to relitigate the same issue in this case. . . . It goes without saying that plaintiff's lack of qualifications deprives him of any right to claim damages under any aspect of the complaint . . . .

Petitioner (Plaintiff) appealed from: (1) the ruling on collateral[1] estoppel; (2) failure to award injunctive[2] relief or punitive damages; and (3) failure to award counsel[3] fees. The appellate court reversed on the ground of collateral estoppel (*Stebbins v. Keystone*, and *Stebbins v. Insurance Company of North America*) and remanded for further proceedings not inconsistent with the appellate court's decision reported at 481 F.2d 501. In footnote 23, the appellate court asserted that "The question of damages and attorney's fees must also be reconsidered, since the trial court rested its judgment disallowing such compensation on the assumed fact of Stebbins' unemployability."

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[1] Collateral Estoppel not applicable to Civil Rights Cases. *Wood v. Davis (1812)*, 11 U.S. (7 Cranch) 270.

[2] *Cooper v. Allen* (C.A. 5, 1972), 467 F.2d at 840.

[3] Right to Counsel Fees in Federal Court, *Annotation:* 8 L.Ed. 2d, at page 925, Section 17; 16 ALR Fed. 643, at 656.

Upon remand of the proceedings to the District Court, Petitioner carried the initial burden of proof as required by this Court in *McDonnell Douglas Corporation v. Percy Green* (May 14, 1973), 411 U.S. 792, at 802.

The District Court entered its order October 4, 1973 –

> The matter of plaintiff's monetary claim for costs, damages, and attorneys fees arising from the letter he received from defendants dated November 26, 1969, which this Court previously has found to have violated Section 704 of the Civil Rights Act of 1964, came on for hearing and argument, and upon findings of fact and conclusions of law rendered in open court, it is this 3rd day of October, 1973,
>
> ORDERED, ADJUDGED, AND DECREED that plaintiff recover from defendants as damages resulting from the said letter the sum of Five-Hundred ($500.00) Dollars nominal compensatory damages and the sum of Two-Hundred and Fifty ($250.00) Dollars punitive damages.

Petitioner (Plaintiff) appealed to the appellate court to enforce its mandate. The appellate court rendered the following orders –

> *February 4, 1974:*
>
> On consideration of appellant's motion for summary reversal, of appellees' response thereto, of appellant's motion to consolidate with No. 73-2224, and of appellees' response thereto, it is
>
> ORDERED by the Court that appellant's aforesaid motions for summary reversal and to consolidate are denied, and, it is

FURTHER ORDERED by the Court, *sua sponte*, that the order of the District Court appealed from herein be, and the same hereby is, affirmed.

February 27, 1974:

On consideration of appellant's motion to reconsider *en banc* this Court's order of February 4, 1974, affirming the order of the District Court, it is

ORDERED by the Court that the aforesaid motion is denied.

JURISDICTION

The order of the United States Court of Appeals for the District of Columbia was entered February 4, 1974. A timely application for reconsideration *en banc* was denied February 27, 1974. Jurisdiction of this Court is invoked pursuant to 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Subsequent to reversal and remand with directions, by the appellate court, whether or not the trial court's failure to require defendants (respondents herein), pursuant to Rule 12(a)(1), Federal Rules of Civil Procedure to file and serve a "responsive pleading" (Answer), prior[4] to proceeding to trial, deprived petitioner of procedural due process of law?

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[4] Compare: In Re Sanford Fork & Tool Company, 160 U.S. 247 (1895). A proceeding to enforce a Mandate, one of the issues in the case was whether or not the plaintiff would be permitted to file his replication subsequent to the appellate court's determination that the defendant's verified answer was legally

(continued)

or

2. Whether or not a complainant, in a Title VII proceeding, who has carried the initial[5] burden of proof under the statute of establishing a *prima facie* case of "r e t a l i a t i o n and r a c i a l" discrimination, is entitled to be awarded costs,[6] reasonable attorney's[7] fees, backpay,[8] and individual[9] or class[10] injunctive relief?

FIFTH AMENDMENT, U.S. CONSTITUTION

"No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

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[4] (continued)

sufficient. Plaintiff had tested the legal sufficiency of the defendant's verified answer by filing and serving exceptions thereto. This Court decided that in an equitable proceeding, the plaintiff could make an election to have the case set-down for hearing on bill and answer or file his replication. Compare Rules 7(a), and 12(a)(1), FRCP.

[5] See, page 802, 411 U.S. 792, *McDonnell Douglas Corp. v. Percy Green (1973)*, and footnotes 18 & 19, at page 805.

[6] *Lea v. Cone Mills Corp. (C.A. 4, 1971)*, 438 F.2d 86.

[7] *Clark v. American Marine Corporation (C.A. 5, 1971)*, 437 F.2d 959. *Robinson v. Lorillard Co. (C.A. 4, 1971)*, 444 F.2d 791.

[8] *Cooper v Allen (C.A. 5, 1972)*, 467 F.2d at page 840:

". . . Cooper is entitled both to backpay and individual injunctive relief . . ."

[9] See, footnotes 6, 7 & 8, *supra*.

[10] *Parham v. Southwestern Bell Telephone Co. (C.A. 8, 1970)*, 433 F.2d 421.

STATUTES INVOLVED

78 Stat. 261, Section 706(g), Public Law 88-352, July 2, 1964, 42 U.S.C., Section 2000e-5(g):

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without backpay (payable by the employer, . . . as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the backpay otherwise allowable. No order of the court shall require the . . . payment to him of any backpay . . . for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of Section 704(a).

78 Stat. 261, Section 706(k), 42 U.S.C., Section 2000e-5(k):

> In any action or proceeding under this title the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . .

RULES INVOLVED

Rule 7(a), F R C P:

> There shall be a complaint and an answer; . . . No other pleading shall be allowed . . .

Rule 12(a)(1), F R C P:

> A defendant shall serve his answer . . . (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; . . .

Rule 69(a), F R C P:

> Process to enforce a judgment for the payment of money . . . . In aid of the judgment or execution, the judgment creditor or his successor in interest when that interest appears of record, may obtain discovery from any person . . .

STATEMENT OF THE CASE

This proceeding is divided into three phases:

I

Prior[11] to receipt of the statutory "*Notice of Right To Sue,*" February 28, 1967, petitioner-plaintiff, a Negro, filed

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[11] See, *Stebbins v. Nationwide Mutual Life Insurance Company (C.A. 4, 1967)*, 382 F.2d 267, cert. den., 390 U.S. 910 (1968). Holding that the plaintiff could not by-pass the EEOC. But see, *Crosslin v. Mountain State Tel. & Tel. (1971)*, 400 U.S. 1004, held that a plaintiff could by-pass the State of Arizona Civil Rights Commission.

in the District Court for the District of Columbia, his first civil rights action (Civil Action No. 466-67) against respondents-defendants, alleging that respondents had discriminated against him on the basis of race in violation of the Civil Rights Act of 1964, 78 Stat. 255, Section[12] 703(a), by refusing to hire him as a claims adjuster, on or about October 30 through November 12, 1966. This action was dismissed pursuant to Rule 37(d), F R C P, for failure of petitioner to comply with the District Court's Order to submit to the taking of petitioner's deposition. The Court of Appeals for the District of Columbia affirmed (Misc. No. 3253, C.A.D.C., 1968).

II

Subsequent[13] to receipt of the statutory *"Notice of Right to Sue,"* on August 21, 1968, petitioner-plaintiff filed a second civil rights action under Title VII of the Civil Rights Act of 1964, 78 Stat. 255, Section 703(a), again in the District of Columbia, U.S. District Court, against these same respondents-defendants, bottomed upon identical facts and issues raised in phase I litigation. This

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12 "It shall be an unlawful employment practice for an employer – (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

13 Compare: *Crosslin v. Mountain State Tel. & Tel. Co.*, 400 U.S. 1004 (1971).

action was dismissed on the ground of *res judicata*, even though it be, plaintiff had been issued the statutory "Notice of Right to Sue," whereas plaintiff-petitioner had not been issued the statutory "Notice of Right to Sue" in the phase I litigation and the trial courts had been without jurisdiction of the subject matter, for the reason that the "Notice of Right to Sue" was a jurisdictional prerequisite or a condition precedent to bringing an action under Title VII. Nevertheless, this Court denied the application for Writ of Certiorari, 396 U.S. 890, 90 S Ct. 194 (1969). But see, *Crosslin v. Mountain State Telephone & Telgraph Company*, *supra*, footnotes 11 & 13 of this petition.

III

On December 19, 1969, petitioner filed the present or instant proceedings, his third civil rights action against these same respondents alleging discrimination based upon race[14] and retaliation.[15] The allegations in this action, however, differed significantly from those in the prior two cases against these same respondents. In the case at hand, petitioner alleged jurisdiction[16] under the Civil Rights Act of 1866, 42 U.S.C. 1981, Section One, as well as under Title VII of the Civil Rights Act of 1964, Section 704(a), 78 Stat.

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[14] 42 U.S.C. 1981, Civil Rights Act of 1866, Section One.

[15] See, Statues Involved, *supra*, 78 Stat. 257, Section 704(a):

"It shall be an unlawful employment practice for an employer to discriminate against any . . . applicants for employment . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title."

[16] Title 28, United States Code, Section 1343(4).

257; and in addition, focused his allegation of discrimination most specifically on respondents' actions in May 1968 and November 1969, rather than upon respondents' conduct in October and November, 1966 (Complaint, USDC DC, Paragraphs III(e) and (f)). Petitioner-plaintiff maintained, however, that from October 1966 through November 1969, the position which he was being denied was that of Property-Casualty Adjuster (Complaint, Paragraphs II(b) and (e), USDC DC).

Subsequent to consummation of services of process and prior to expiration of time within which to file respondents' answer (responsive[17] pleading) to the verified complaint, respondents-defendants filed January 19, 1970, a motion to dismiss, and petitioner-plaintiff filed June 1, 1970, a motion for summary judgment. The trial court held that "summary judgment is granted plaintiff to the limited extent of a declaration that the quoted portion of Keystone's letter was a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C., Section 2000e, *et seq.*"; and denied petitioner-plaintiff relief as to – costs, reasonable attorney's fees, backpay, and injunctive relief for the class or individually. On appeal to the United States Court of Appeals for the District of Columbia, affirmed as to liability of respondents-defendants, and reversed[18] with directions to reconsider the question of damages, costs and attorney's fees. The Mandate was issued June 26 or 27,

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[17] Procedural and dispositive motions are not "responsive pleadings" within the meaning of the Federal Rules of Civil Procedure. See, 37-A Words & Phrases 56, and Cumulative Annual Pocket Supplement. See also, Rules Involved, *supra*.

[18] See, footnote 23, 481 F.2d 501, (C.A.D.C., June 5, 1973) *Stebbins v. Keystone Insurance Company, et al.*, 156 U.S. App. D.C. 326.

1973, as a matter of course, Rule 41, F R A P. Petitioner served the following interrogatories upon respondents[19], June 29, 1973 (See, Appellant's Motion for Summary Reversal, November 26, 1973, United States Court of Appeals, D.C.):

"1. What is the total amount or sum of money expended by defendants in defense of litigation involving these proceedings, from October 30, 1966, to the present?

"2. Particularize each expenditure?

"3. What was the total number of job vacancies created during the period from October 30, 1966, to present, in the following positions – Claims Adjusters, Examiners, Supervisors and Managers?

"4. Particularize the following as applicable to question 3: period of duration of vacancy; qualifications required; wages or salaries paid each person or persons filling the vacancy; dates of each; give names, addresses, sex, race, qualifications, and social security numbers of each, whether or not the person or persons are presently employed with the defendants?

"5. State with particularity, whether or not defendants filed with the Equal Employment Opportunity Commission "Employer Information Report EEO-1, for the years – 1973,

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[19] The Courts below failed and refused to compel the respondents to respond thereto. See, District Court Order, September 18, 1973. See also – Record, *USDC DC.*

1972, 1971, 1970, 1969, 1968, 1967, and 1966?

(b) Attach a copy of each of the foregoing reports to your answer?"

July 11, 1973, the trial court held a "Status Conference"[20] for the purpose of soliciting suggestions from the litigants to determine means of resolving the dispute and requested or commanded the party-litigants to file and serve their suggestions prior to July 30, 1973. Petitioner-plaintiff filed his suggestions July 12, 1973, advising the court that respondents-defendants must respond to all outstanding discovery and file their answer to the verified complaint prior to resolution of the controversy, even though the issue of liability of respondents has been established, and their failure to file an ANSWER would or should be considered as a contempt or default in favor of the petitioner.

Respondents, instead of filing an Answer as required by Rule 12(a)(1), F R C P, filed and served a motion for summary judgment, and the petitioner opposed the motion, attaching thereto exhibits received from respondents – Plaintiff's Exhibits I, & I-I, which are printed in the Appendix. The trial[21] court failed to rule on the motions.

During the trial court proceeding, plaintiff (petitioner herein) gave the following undisputed testimony, at page 3:

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[20] Transcripts of the "Status Conferences," July 11, 30, 1973, Record United States District Court, District of Columbia.

[21] Transcript of Trial, October 3, 1973, filed November 14, 1973.

> "MR. STEBBINS: Let's take the special damages.
>
> In October 1966, I consulted with Mr. Bryant and Mr. Benjamin, who was representative of Keystone Insurance Company; and Mr. Benjamin and Mr. Bryant informed me that he would give me $10,500 a year. In about eight-to-ten-months, I would be raised from $10,500 to $14,200 a year. This is the basis of the special damages in this particular incident."

the testimony continues at page 4:

> "Now, as to the punitive damages, my contention is that I should be allowed punitive damages in the sum of $60,000, on the basis of Keystone's employment record from 1966 to the present."

attorney's fees:

> "Now, the rates in the District of Columbia, I think, for indigents is $20 an hour, out of court, and $30 an hour in court. The rate in the District for non-indigents, I think, is $35 an hour. I consulted with some attorneys. They say they usually charge $60 or $70 an hour, depends on the client's ability to pay or the difficulty of the case."

at page 7, the trial court appears to be confused as to stay[22] of a proceeding in equity. An appeal from a decree in equity vacates the decree, and proceedings under Title VII are equitable in nature –

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22 "Stebbins appeals from: (1) the ruling on collateral estoppel; (2) failure to award injunctive relief or punitive damages; and (3) failure to award counsel fees," 481 F.2d 501 at 506, CADC, 1973, "B. The Keystone Litigation", 156 U.S. App. D.C. 326.

"THE COURT: Now, my decision was never stayed. I don't even know – can counsel tell me whether any appeal was taken from that part of my decision?

MR. BROMLEY: It was not, Your Honor.

THE COURT: So there were nine months that one could say that that letter operated as a bar to your pursuing an application for employment to Keystone; is that correct?

MR. STEBBINS: That is correct, Sir.

THE COURT: Now, did you seek any other employment in that period?

MR. STEBBINS: Yes, I seek other employment with other insurance companies.

THE COURT: From whom?

MR. STEBBINS: INA was one of the companies; Continental is another company; and then Nationwide again.

THE COURT: After my decision?

MR. STEBBINS: Yes, sir.

THE COURT: You applied for jobs at those companies?

MR. STEBBINS: That is correct, Nationwide and State Farm.

THE COURT: Very well. Anything else you want to tell me?

MR. STEBBINS: I think that is about it, Your Honor."

FINDING OF FACT & CONCLUSIONS OF LAW

The Trial Court concluded, at pages 33, 34 & 35, Transcript of Proceedings and Evidence, October 3, 1973:

THE COURT: This matter is before the Court for determination of damages:

Plaintiff Stebbins, appearing *pro se*, claims have arisen out of the letter written by Defendant Keystone to the Plaintiff on November 26, 1969, which the Court has found was in violation of Title VII of the Act.

The burden to establish damages is, of course, upon the plaintiff. Plaintiff claims both compensatory and punitive damages.

After considering the file and the testimony which has been presented today, the Court has concluded that the situation before the Court, as far as compensatory damages is concerned, necessitates only a nominal award.

Plaintiff has not met his burden, because an undertaking to recommend him for employment in '66 provides no firm basis for concluding that the employment was available[23] or that he would be deemed qualified[24] by the employing officials of the company as of November 26, 1969.

I do not believe there has been an adequate showing that plaintiff has taken any steps in the interim to

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[23] See, Interrogatories propounded to Respondents, June 28, 1973, respondents refused to respond and the Courts below refused to require an answer by respondents even though petitioner filed a motion to compel. The Questions are set forth in this petition, *supra*.

[24] See, Plaintiff's Exhibits I, and I-I, printed in the Appendix. Defendants-respondents admitted that there was *no requirements* for the jobs.

mitigate[25] his damages of a compensatory character or, indeed, that his past employment record would justify the type of compensatory claim which he seeks.

He is not entitled to any attorney's fees[26] since he is appearing *pro se;* and the sole question on compensatory damages is whether or not he lost employment income.

Therefore, as to compensatory damages, the Court will make a nominal award of $500.

On the matter of punitive damages, the Court must take into account the circumstances revealed by this file, which disclose a history of unsuccessful litigation and somewhat harassing and annoying litigation by this plaintiff against Keystone. I believe the letter which the Court has found contrary to the statute is a letter that was written out of anger at Mr. Stebbins, by reason of his having pursued his rights under the statute. Nonetheless, I think the letter was a factor and that, therefore, I should award

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[25] Petitioner-Plaintiff has filed more than six different law suits against other insurance companies, seeking employment within the insurance industry. For example: 469 F.2d 268; 442 F. 2d 843 (1971); 413 F.2d 1100, cert. denied, 396 U.S. 895 (1969); 382 F.2d 267 (1967).

[26] Annotation: Attorney's Fees Under Section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)), 16 ALR Fed. 643, at 656. See also Annotation: Right To Counsel Fees In Federal Court, 8 L.Ed.2d at page 925, Section 17.

slight punitive damages, partly because of the prophylactic effect on this corporation. I, therefore, award $250 punitive damages, making the total award $750.

That is the judgment of the Court and that concludes litigation.

REASON FOR GRANTING THE WRIT

On May 14, 1973, this Court declared that a complainant in a Title VII trial must carry the initial burden under the statute of establishing a *prima facie* case of racial discrimination, or retaliation. *McDonnell Douglas Corp. v. Percy Green*, 411 U.S. 792 at 802. In the proceedings at hand, your petitioner has done just that, by showing: (1) that he belongs to a racial minority; (2) that he applied and was qualified[27] for the job for which the respondents were seeking applicants; (3) that because the petitioner has or had asserted his statutory rights by means of the judicial process, he was rejected "the Keystone Insurance Company would not be interested in any application filed by" petitioner for "any job;" and (4) that the courts below failed and refused to afford your petititioner a full and fair opportunity to make, or compel respondents to respond to the following questions:

"3. What was the total number of job vacancies created during the period from October 30, 1966, to present, in the following positions – Claims Adjusters, Examiners, Supervisors and Managers?

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[27] Defendants-respondents admit that no *"requirements"* are necessary. See Appendix. at page 2a.

4. Particularize the following as applicable to question 3: period of duration of vacancy; qualifications required; wages or salaries paid each person or persons filling the vacancy; dates of each; give names, addresses, sex, race, qualifications, and social security numbers of each, whether or not the person or persons are presently employed with defendants?"

A. Law remedies: Backpay

It appears to petitioner that backpay should be awarded as a matter of course, certainly as a matter of absolute right, where the petitioner proves, or is precluded from proving, that he suffered money damages, by the failure of respondents to respond to the above-designated, or propounded questions; and the failure of the courts below to compel responses thereto. The District Court should not be allowed any discretion with respect to the award of backpay damages than would be permitted in a conventional action at law case. The difficulty is presented by the statutory language that the court may order "reinstatement or hiring of employees, with or without backpay." See, Statutes Involved, *supra*. Does "with or without" imply discretion? If so, in what factual or legal situations is it to be invoked? The statutory implication of discretion must be considered in reference to this Court's ruling in *Supervisors v. United States*, 71 U.S. (4 Wall.) 435 (1866). This Court asserted that where power is given by statute to public officers, in permissive language – as that they may, if deemed advisable, do a certain thing, the language used will be regarded as preemptory where the public interest or individual rights require that it should be.

What the courts are empowered to do for a third person the law requires shall be done. The power is given, not for the benefit of respondents. It is placed with the judiciary to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those aggrieved individuals who are entitled to invoke its aid, and who would otherwise be remediless.

In all such cases, it appears that the intent of Congress – to eliminate racial discrimination in employment, which is the test, was not to pass on to others a mere discretion, but to impose "a positive and absolute duty" to award backpay[28] damages.

B. Equitable remedies

What should or would be the scope of the basic equitable remedy, injunction, in Title VII cases? Apparently, in its most limited form the injunction would simply order the defendants not to discriminate against the claimant, or plaintiff, and would make the proscription more specific by referring to the particular problem involved in the case. That is to say, the injunction would command or order the defendants-respondents to consider the claimant's application for employment without regard to the claimant's race, color, religion, sex, or national origin. In most situations the order should extend beyond this and require affirmative remedial action as expressly authorized by the statute. Section 706(g), 78 Stat. 261. This Court has never ruled on the question.

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[28] See, "Backpay" Awards Under Title VII of the Civil Rights Act of 1964, by George A. Davidson, 26 Rutgers Law Review 741 (1973).

Some circuit courts have held that all those who are victims of discriminatory practices are included in the class afforded monetary relief whether or not they have filed a charge with the Equal Employment Opportunity Commission. *Robinson v. Lorillard Corp.* (C.A. 4, 1971), 444 F.2d 791. The rulings have indicated an obligation to provide relief for all who are similarly situated.[29] *Sprogis v. United Airlines, Inc.* (C.A. 7, 1971), 444 F.2d 1194. It has been noted that backpay is not a punitive measure, but an equitable remedy intended to restore the recipients to their rightful economic status absent the effects of the unlawful discrimination. See, *Robinson v. Lorillard Corp., supra.*

Exciting curiosity, District Judge Kinneary in *Local 2111, IBEW v. General Electric Company*, 4 E.P.D. par. 7614 (SD Ohio, Dec. 3, 1971), ruled that where injunctive relief was no longer appropriate since the discriminatory practice had been corrected, in spite of that backpay damages could be awarded. The District Judge specifically rejected the contention that the Act does not permit the awarding of damages except in conjunction with reinstatement or hiring and relied upon the District Court's decision in *Robinson v. Lorillard Corp.*, 319 F. Supp. 835 (M.D.N.C., 1970).

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[29] *Cox v. Babcock & Wilcox Company* (C.A. 4, 1972), 471 F. 2d 13 at 16 – the dismissal of an individual litigant's complaint where class relief had been sought did not require dismissal of the class action. See also – *Bowe v. Colgate-Palmolive Company* (C.A. 7, 1969), 416 F.2d 711 at 719.

C. As to attorney's fees

Section 706(k), 78 Stat. 261 provides that – the court, in its discretion, may[30] allow the prevailing party a reasonable attorney's fee as part of the costs.[31] Petitioner is the prevailing party and should be allowed costs, notwithstanding the fact petitioner is not an attorney at law. The awards should be assessed in favor of petitioner, or $60,000.00 punitive damages.

D. Deprivation of procedural due process of law

Service of process was completed upon defendants-respondents, December 30, 1969, and respondents moved to dismiss the verified complaint, January 19, 1970, prior to filing, or requesting enlargement of time within which to file their answer.[32] Petitioner filed a timely opposition thereto. On or about June 1, 1970, petitioner filed a motion for summary judgment, which was granted interlocutory in character, as to liability; and denied as to relief. Petitioner appealed[33] that portion of the judgment denying relief. The appellate court reversed and remanded the cause to the District Court to consider relief, and affirmed the liability issue.

By operation of law, Rules 7(a), and 12(a)(1), F R C P, the respondents were required to file their a n s w e r

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30 *Supervisors v. United States*, 71 U.S. (4 Wall.) 435.

31 See footnote 3, *supra*. See also – Annotation: 16 ALR Fed. 643, at 656, Attorneys Fees Under Section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

32 See, footnote 17, *supra*.

33 See, questions presented, *supra*.

within 10 days subsequent to entry of the Mandate, June 27, 1973; and failure to so do, in this case, entitled petitioner to a judgment by default under Rule 55(a), F R-C P to all relief demanded in the verified complaint – Costs, reasonable attorney's fees, and $60,000.00 punitive damages. Compare:[34] *Charshee v. Geraghty*, 198 NYS2d 686, at page 688 (1960). *In Re Sanford Fork & Tool Company*, 160 U.S. 247 at 256 (1895), a similar procedural matter arose, this Court held that where a plaintiff tested the legal sufficiency of the defendant's answer, by filing exceptions thereto, which was overruled by the appellate court, under the equity practice then in effect, the plaintiff could – (1) file his replication; or, (2) set the case down for hearing on Bill & Answer (merits). Under the modern federal practice he must file his answer if the court denies the motion to dismiss, Rules 12(a)(1), and 7(a), otherwise respondents are in default.

The courts below disregarded the provisions of the enabling clause of the Federal Rules of Civil Procedure, and the Fifth Amendment of the Federal Constitution – 28 U.S.C. 2072, such rules shall not abridge, enlarge or modify any substantive rights, and no person shall be deprived of life, liberty, or property, without due process of law, respectively.

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[34] See, footnote 4, *supra*. See also, Record, U.S. Court of Appeals, D.C., November 26, 1976 Appellant's Motion for Summary Reversal; and Appeal & Error, key numbered 1203(3), Time To Proceed After Mandate.

CONCLUSION

It is respectfully submitted that, of the alternatives available to the Court, the issuance of the writ should be granted and the judgments below summarily reversed, would appear the most appropriate.

Respectfully submitted,

EMMETT J. STEBBINS,
5880 Eastern Avenue, N.E.
Washington, D.C. 20011
Petitioner

APPENDIX A

KEYSTONE INSURANCE COMPANY

2040 MARKET STREET · PHILADELPHIA, PENNSYLVANIA 19103 · TELEPHONE: (215) 864 5046

July 17, 1973

Mr. Emmett J. Stebbins,
5880 Eastern Avenue, N. E.
Washington, D. C. 20011

Dear Mr. Stebbins:

On July 6, 1973, I forwarded you an employment application with Keystone Insurance Company. As a service to you I am herewith enclosing a copy of the job description for a Casualty Adjuster I - the entry level position in our Claims Department. The compensation range for this job is between $6,500. and $9,300. per year.

If there are any other questions you may have with respect thereto, please do not hesitate to contact me.

Sincerely yours,

Birchard T. Clothier
Secretary

BTC:W
Enc.

APPENDIX B

Dept. Claim

Job Title Casualty Adjuster I

Basic Function:

Investigates, negotiates and settles minor personal injury and property damage claims.

Principle Responsibilities and Duties:

1. Investigates by taking statements, photographs.
2. Interviews involved persons, accident situations involving automobile or home, and residential property of the policy-holder.
3. Consults with supervisor concerning evaluation and tactics of claim negotiations.
4. Performs all related duties as requested by claim management to conclude claims within accepted and stated Company procedures.

Requirements:

Education

College graduate desirable

Experience:

Up to 1 year experience in public contact environment.

Date_____